

1 his deposition that, [REDACTED]
2 [REDACTED]
3 [REDACTED] [REDACTED]
4 [REDACTED] And I
5 thought that's the reason he's really going
6 into it.

7 What I didn't realize until I read
8 the witness statement is it's mainly about his
9 Charter experience.

10 JUDGE SIPPEL: Well, wait a
11 minute. I mean, I got to be sure I got
12 everybody straight on this one now.

13 Was this subject gone onto at his
14 deposition?

15 MR. CARROLL: [REDACTED]

16 MR. PHILLIPS: [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 JUDGE SIPPEL: No. That's not my
21 question.

22 MR. PHILLIPS: Right. I'm sorry,

1 Your Honor.

2 JUDGE SIPPEL: Here's my question:
3 What is stated here in paragraph 8 was that
4 subject gone into in his deposition?

5 MR. CARROLL: [REDACTED]

6 JUDGE SIPPEL: [REDACTED]

7 [REDACTED]

8 MR. PHILLIPS: Well, Your Honor,
9 if I may break it down, the second sentence of
10 paragraph 8 [REDACTED]

11 [REDACTED]

12 JUDGE SIPPEL: That's in brackets.
13 Does that mean that it would be redacted?

14 MR. CARROLL: Redacted.

15 JUDGE SIPPEL: Thank you.

16 MR. PHILLIPS: Other than the fact
17 that Mr. Rigdon said it, [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 MR. CARROLL: Your Honor, I think

1 in answer to your question --

2 JUDGE SIPPEL: All right. Well,
3 let me -- let me -- go ahead.

4 MR. CARROLL: -- which wasn't
5 could you cross it, was it gone into. [REDACTED]

6 [REDACTED]
7 [REDACTED]

8 JUDGE SIPPEL: Well, that's really
9 my question. And you don't have any argument
10 with Mr. Carroll's characterization?

11 MR. PHILLIPS: [REDACTED]
12 [REDACTED] Your Honor. I know
13 Mr. Carroll started to make the suggestion,
14 which I also agree with, which was it's not
15 really effective cross-examination of someone
16 if you don't have the written materials from
17 the time that show the contemporaneous
18 decisions that were being made. And that's
19 what we would have sought through discovery,
20 Your Honor.

21 JUDGE SIPPEL: Well, that's
22 basically an old -- that's a kind of a rubric

1 that we all go by. But, it's got nothing to
2 do with the specific situation.

3 And also, all I'm trying to get at
4 is how could you go through a deposition when

5 [REDACTED]

6 [REDACTED]

7 may see this kind of testimony again some day?
8 I mean, you know were you expecting this to
9 just go into a vacuum, an evaporation machine
10 because you didn't have documents?

11 MR. PHILLIPS: Your Honor, I knew
12 it might, as with every witness, I always
13 assume that their background is important.
14 But I didn't know that what he was going to be
15 called for principally his experience at a
16 different organization, not Comcast.

17 JUDGE SIPPEL: Well, that's your
18 characterization. And I'm not trying to argue
19 that your characterization is wrong. I'm
20 simply saying that I'm not at all convinced
21 that there's anything afoul here and maybe the
22 less corroboration this witness can make in

1 the final analysis, maybe the less weight,
2 maybe there is a credibility issue. But I
3 mean, obviously, I can't get to that yet.

4 But I just don't understand your
5 assertion seems to be that you got jammed on
6 this witness and you didn't have any idea
7 about what he was going to testify to really.
8 That you thought it was going to be something
9 of a nature of his carrying out Comcast policy
10 for a couple of weeks after he was hired as
11 opposed to giving -- well, basically giving
12 the story of how his experience was with
13 Tennis Channel when he was at Charter.

14 And I agree, you know any lawyer
15 worth his salt is going to want to have
16 documents behind it. I agree with you. But
17 the time has slipped by and there was no
18 effort to get those documents, as I can see.
19 And I just don't understand -- what really
20 gets me is how you could argue that you're
21 surprised, you were surprised when you saw
22 this witness being proffered that he's going

1 to testify as to his experience at Charter
2 with respect to Tennis Channel with respect to
3 his sports tier. I mean --

4 MR. PHILLIPS: Well, Your Honor,
5 again --

6 JUDGE SIPPEL: -- I'm tossed with
7 that one.

8 MR. PHILLIPS: -- I thought that
9 his testimony along the lines. While
10 certainly his Charter experience might inform
11 it, as every witness' experience is informed
12 by, but I didn't realize that that was going
13 to be the [REDACTED]
14 or else we would have sought documents.

15 I will point out, Your Honor,
16 again that at the time we were told this, two
17 days before his deposition and at the end of
18 discovery, there really wasn't sufficient time
19 to get a subpoena out to Charter to get
20 documents from him.

21 And again, [REDACTED]
22 [REDACTED]

1 [REDACTED] And that non-public
2 information has a bearing on the decisions
3 that the MSO made. And therefore, you know
4 it's fine to say "Well, this is how they treat
5 it." But if you're going to hear testimony
6 from somebody saying [REDACTED]

7 [REDACTED]
8 [REDACTED] I think it's only fair for us,
9 Your Honor, for us to have gotten the
10 documents which--

11 JUDGE SIPPEL: That's questioned--
12 I'm sorry, I didn't mean to cut you off. I
13 hear you.

14 MR. PHILLIPS: Okay.

15 JUDGE SIPPEL: That's question-by-
16 question objection. But the terms of the
17 subject matter of his testimony, I say I just
18 kind of sit up and take notice when I hear
19 you're saying that you really didn't think
20 that that was going to come up, that the main
21 thrust of his testimony was going to be this
22 and that. I mean, I just don't see how you're

1 trying to get me from there to there.

2 Let's do it this way: Let's just
3 take it as it comes in. We'll have to rule on
4 it. If you want to do it today, we're going
5 to move these in today?

6 MR. PHILLIPS: I don't think we're
7 moving any of the testimony in until the
8 witness is proffered.

9 JUDGE SIPPEL: That was my
10 understanding, but I want to be sure.

11 MR. CARROLL: It was my
12 understanding as well, Your Honor.

13 MR. PHILLIPS: Well, Your Honor--

14 MR. CARROLL: And again, I think
15 Your Honor will have a good sense for all of
16 this, and that's why I proposed what I
17 proposed at the outset with respect to some of
18 the other documents.

19 MR. PHILLIPS: Yes.

20 MR. CARROLL: You're the
21 factfinder here and the law. And as the
22 events unfold and the evidence starts to come

1 in on direct, I think you'll be in a very good
2 position assess its weight. I think Your
3 Honor has got a sense for this issue.

4 I would just point out two other
5 points. Mr. Phillips keeps saying that
6 somehow [REDACTED] [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] [REDACTED] [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] [REDACTED]

21 [REDACTED]

22 [REDACTED] You're going to hear Wimbledon in

1 this case. [REDACTED]
2 [REDACTED]
3 [REDACTED] You know, I don't have all
4 the information documents from Wimbledon and
5 I'm going to have Mr. Solomon talking bout
6 Wimbledon. And I'm going to be stuck with
7 cross-examining Mr. Solomon without the
8 benefit of things from Wimbledon. It is what
9 it is.

10 But the same cuts the other way.
11 They have complete access and [REDACTED] from
12 Charter for anything having to do with them,
13 which is what this case is about, Tennis
14 Channel.

15 And all that happened at the
16 deposition was, [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED] [REDACTED] They could
19 have gotten that consent. They didn't go out
20 and do anything, and it's not fair for them to
21 try and cut it off now because of their own
22 actions, in my view.

1 JUDGE SIPPEL: Well, I could let
2 you respond to that, but I know where it's
3 going. It's going to go back.

4 Let's do this: We don't have to
5 rule on this today. This is for another day.
6 In the meantime, I hate to impose this on
7 counsel right before a hearing, but I'd like
8 to have -- well, let me before I say what I'd
9 like, I take it you're making -- what's the
10 basis for your objection?

11 MR. PHILLIPS: The basis for our
12 objection is, Your Honor, that this came up at
13 the last moment. We weren't given the
14 opportunity to seek documents from Charter on
15 the decisions about which Mr. Rigdon is
16 testifying because, basically, this evidence
17 was put in late. It was developed late, we
18 weren't informed about it until two days
19 before the end of discovery. At that point in
20 time it was too late for the subpoena.

21 Listening to Your Honor, if I may
22 offer just a proposed solution to it.

1 JUDGE SIPPEL: Well let me, before
2 you get to that, I want to be sure that I
3 understand the significance of this objection.

4 You're claiming, I take it and I
5 don't want to put words in your mouth, but
6 this is basically that you would not be given
7 a fair hearing on this particular point unless
8 some corrective measures were taken or unless
9 this part of his testimony was stricken?

10 MR. PHILLIPS: I think that's
11 fair, Your Honor. I don't think we can
12 conduct a fair cross-examination on his
13 experience and on the decisions he made while
14 at Charter without being able to serve a
15 subpoena on Charter.

16 JUDGE SIPPEL: No, I understand.
17 Don't repeat that, because I understand that
18 exactly.

19 Okay. Then I'm going to need some
20 kind of a bench briefing on the point for
21 obvious reasons. But before you get to that,
22 what's your proposal?

1 MR. PHILLIPS: Well, what my
2 proposal is, Your Honor, is to go through this
3 in a way that I didn't do today, but to go
4 through this on a much more of a line-by-line
5 basis as the testimony is presented with a
6 bench briefing. And at that point in time
7 we'll present Your Honor with authorities.
8 And specifically, it's breaking this down on
9 a sentence-by-sentence or paragraph-by-
10 paragraph basis of what our objection will be.

11 At that point in time Your Honor
12 will have a much fuller understanding of the
13 case and we'll provide authorities for our
14 position.

15 JUDGE SIPPEL: And how does that
16 strike you, Mr. Carroll?

17 MR. CARROLL: Your Honor, that
18 sounds fine because actually we haven't had
19 the benefit of that exchange between counsel
20 in terms of line-by-line and whatnot. And it
21 could be, again this applies to a lot of the
22 evidence in this case, that by the time Mr.

1 Rigdon goes, it will be after their case has
2 gone. We may have testimony from Mr. Solomon,
3 for example, Tennis Channel about their
4 dealings with Charter already. It may be that
5 we're able to agree on portions of Mr. Rigdon
6 that are sufficient for both side's purposes.
7 So I think it's a fine proposal to say let's
8 deal with this when we get a little bit closer
9 and we'll do it on a more granular basis,
10 line-by-line, paragraph-by-paragraph. I'm
11 fine with that.

12 JUDGE SIPPEL: So it is a kind of
13 standard stay tuned position you're taking?

14 MR. CARROLL: Yes.

15 JUDGE SIPPEL: Let's see what
16 happens. I can live with that, too.

17 I will issue an order and tell you
18 what I want. And I don't want it to go
19 beyond, you know a what? A motion and an
20 opposition. I mean in other words, I don't
21 want replies on this thing. There's
22 absolutely no reason for that. But certainly

1 you can lay out what you want to lay out in
2 terms of just as you did propose it, so rather
3 than try and repeat everything.

4 Is that the only problem now?
5 Because I know this is going to be a very
6 friendly session and --

7 MR. CARROLL: It is. I'm still in
8 a friendly mood.

9 JUDGE SIPPEL: All right.

10 MR. CARROLL: And you'll notice,
11 I've raised nothing on my side.

12 Are there any other issues?

13 JUDGE SIPPEL: Then why are you
14 talking so much?

15 MR. CARROLL: I don't know. Mr.
16 Solomon asked me to do all the talking.

17 MR. PHILLIPS: We have no other
18 issues on our side, Your Honor.

19 JUDGE SIPPEL: Okay.

20 MR. PHILLIPS: And we have the
21 advantage, Your Honor, that we know each other
22 very well, obviously.

1 JUDGE SIPPEL: All right. Well,
2 I've gathered that.

3 Now I'm just going to make one
4 editorial comment and then I'm going to leave
5 it and we're going to go on with these
6 documents.

7 But, you know I've had two
8 experiences, two out of three. We did go with
9 one case that certainly did not involve your
10 law firm about, you know going all the way to
11 propose, to findings, conclusion, decision and
12 it's up there someplace. The other two it was
13 after the trial that I get telephone calls
14 that we're going to settle this thing.

15 Now, I just want to just as a
16 matter of information from you gentlemen,
17 could that happen here too? I mean, you
18 certainly must know about your respective
19 cases pretty well and your positions must be
20 pretty well established. Is one side going to
21 crumble while all this evidence comes out, or
22 what are we doing here exactly?

1 MR. PHILLIPS: Your Honor, we
2 always hope to achieve a settlement.

3 JUDGE SIPPEL: Of course.

4 MR. PHILLIPS: We've had a lot of
5 discussions. [REDACTED]

6 [REDACTED] But I -- you know,
7 I think the parties are very well informed
8 about their positions.

9 JUDGE SIPPEL: I don't doubt that,
10 but you can see where I'm getting. I mean,
11 this happened to me twice and everybody has
12 worked very, very hard, which is okay, too.
13 I'm against hard work. But is really kind of
14 after -- you know, you've basically had a
15 litigation experience with the Bureau. Then
16 [REDACTED] I
17 mean, if this were a long engagement, this --
18 you know each other pretty well is what I'm
19 trying to say.

20 MR. PHILLIPS: Very much. And I
21 can tell you from the Tennis Channel, which is
22 not a big well funded huge company, it's

1 extremely significant that it goes on as long
2 as it does, and it's not without sacrifice
3 that we're here. We would very much welcome
4 the opportunity to try to settle. But I don't
5 -- I understand Your Honor's point.

6 JUDGE SIPPEL: Well, that really
7 strikes me. I was beginning to feel that way
8 about the NFL at one point, too. But anyway,
9 it's a good argument.

10 Okay. Let's get on with the real
11 work then, documents. Ready to go? You want
12 to take a break before we go?

13 MR. SCHMIDT: Well, I don't know
14 that there's a need to take a break. I think
15 what we were able to work out last night is
16 that we're generally agreeable to the
17 documents coming into evidence.

18 There was a small number of
19 documents on their side where we raised
20 relevance objections and they said let's deal
21 with it down the road, and we were agreeable
22 to dealing with it down the road.

1 There are other documents which I
2 think Your Honor has already touched on that
3 have hearsay issues, newspaper articles,
4 things like that where we said when those come
5 in, Your Honor will take them for what they're
6 worth. And if there's a specific hearsay
7 objection, we can raise that at the time.

8 But I think subject to those
9 agreements that we've reached, I'm not sure
10 that we have issues to present to the Court in
11 terms of the documents. And I think we're
12 agreeable to vast majority of the documents
13 coming into evidence.

14 JUDGE SIPPEL: Well, I know but i
15 have to make a record of this. How do you
16 want me to do this. I mean, I can't just
17 bless that statement then --

18 MR. CARROLL: Yes. I think we need
19 a recital of the --

20 MR. SCHMIDT: Yes Maybe what would
21 make sense is to do exactly that.

22 Here's the agreement we reached,

1 Your Honor. We put in our list excerpts from
2 Mr. Burke's and Mr. Shell's testimony in the
3 NFL case, the public testimony. Comcast is
4 going to put in fairness rebuttal designations
5 on those. So those will complete those
6 exhibits.

7 As a matter of notice for the
8 Court, we put in some of the pleadings that
9 initiated this proceeding. Comcast will add
10 in the sur reply papers that they put in for
11 completeness, again.

12 Comcast put into evidence Mr.
13 Brooks' and Dr. Singer's deposition
14 transcripts. And they put in excerpts of
15 those transcripts. We agreed that they would
16 put in the entire transcripts.

17 There are various documents that
18 contain hearsay or that reflect third party
19 documents like newspaper articles, websites.
20 We are agreeing that those come in subject to
21 specific objections depending on how they're
22 used on hearsay or on the reliability of them.

1 And then we had a short list of
2 documents that we had relevance objections to
3 that we'll continue to confer with Comcast
4 about, but that the agreement we reached last
5 night was that we would hold on those
6 documents specifically in terms of admitting
7 them, and I would deal with them as they come
8 up or along the lines Mr. Carroll suggested
9 earlier; see if we can resolve them in advance
10 or it may be that they just don't need to come
11 in at the actual hearing depending on how the
12 evidence comes in.

13 And those are exhibits from
14 Comcast's list: [REDACTED]
15 [REDACTED] And then
16 a series in the [REDACTED]
17 [REDACTED] And then a series going into the [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 We received about 620 exhibits
21 from Comcast, and this was the very small
22 subset that we had specific relevance

1 objections to. So those are in the record.

2 I think subject to those,
3 everything else I think the parties are in
4 agreement, can be marked into evidence at this
5 time.

6 JUDGE SIPPEL: Well, let me
7 suggest then. I mean, I had just as soon take
8 documents one at a time; do you object, no I
9 don't object, that kind of thing.

10 Why don't we just take a recess
11 and you can have your document people sit down
12 with the court reporter and tell us what
13 you're doing. And then if you can get all of
14 these things down on a document exhibit list,
15 and both sides can say, you know whatever the
16 circumstances are and then I could sign off as
17 approved, then that record would be very well
18 established, probably better than the other
19 way.

20 MR. SCHMIDT: Okay.

21 JUDGE SIPPEL: Then the second
22 grouping, I would like to see in as exhibits

1 subject to. And then the third grouping that
2 is absolutely, you know that we have to wait
3 until we get a witness or bring them in one at
4 a time, then we'll just leave those to the one
5 side. How does that sound?

6 MR. SCHMIDT: That's essentially
7 the agreement we reached last night.

8 JUDGE SIPPEL: That's what it
9 sounded like to me, too. Well, I'm just
10 trying to think through the mechanics.

11 MR. SCHMIDT: Yes.

12 JUDGE SIPPEL: All right. Well,
13 let's try and see how it goes for a couple of
14 hours. And after lunch, you can let me know.
15 I'll be upstairs. You let me know how it's
16 going. And I'll come down. We'll have the
17 reporter here, so we're going to pay for him.
18 His time is being paid for.

19 MR. PHILLIPS: Understood.

20 JUDGE SIPPEL: You don't have any
21 problem with this, do you? This is a little
22 bit unusual, the procedure I'm talking about?

1 COURT REPORTER: I'm not familiar
2 with how you mark documents, but it can't be
3 that tough.

4 JUDGE SIPPEL: Oh, okay. That
5 answers my questions.

6 So why don't we just recess until
7 I'm called or until let's say I come down at
8 1:00 and we'll get a status report on this.

9 MR. SCHMIDT: I this will be much
10 quicker than that, Your Honor.

11 JUDGE SIPPEL: Well then let me
12 know, I'll be right upstairs. I'm available.
13 I'm not out on the island someplace, you know.

14 MR. CARROLL: And you're happy to
15 be here rather than on the island?

16 JUDGE SIPPEL: Well, yes. See, I
17 didn't have broadband out there, so I can't
18 stay in communication without broadband.

19 MR. CARROLL: Now, Your Honor, if
20 you had told us that, Comcast I'm sure--

21 JUDGE SIPPEL: I can show you, and
22 I will bring it in, I have a newspaper

1 clipping within the last six months of
2 somebody's complaining to you know who about
3 you know what, and they can't get them to put
4 anything out there.

5 MR. CARROLL: Now, you see, Your
6 Honor, newspaper clippings are not substantive
7 evidence.

8 JUDGE SIPPEL: But they're
9 interesting sometimes.

10 MR. CARROLL: I'll bet they are.

11 JUDGE SIPPEL: All right. Let me
12 recess then. Let me say just arbitrarily
13 until 1:00 but I'm subject to call.

14 (Whereupon, at 10:00 a.m. in
15 recess until 10:53 a.m.)

16 JUDGE SIPPEL: What's the report.

17 MR. CARROLL: Your Honor, I the
18 teams have worked it all out. And I think if
19 respective colleagues on each side can just
20 recite on the record, there are no document
21 issues to be decided. I think we've reached
22 an agreement that precludes.